Supreme Court, U.S.
FILED
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No. ——

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7945

ROBERT D. JOFFE
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

October 19, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

87pp

QUESTIONS PRESENTED

The United States Court of Appeals for the District of Columbia Circuit held in this case that 47 U.S.C. § 533(f)(1)(A), which limits the number of subscribers to whom operators of cable-television systems may speak, and 47 U.S.C. § 533(f)(1)(B), which limits the amount of their own speech cable operators may provide over their cable systems, do not abridge free speech in violation of the First Amendment.

The questions presented are:

1. Whether strict scrutiny is triggered when Congress imposes direct limits on the quantity of a cable operator's expression in an attempt to enhance the overall diversity of speech content within the cable medium.

2. Whether a law restricting speech as a "structural" "prophylaxis" is invalid under intermediate scrutiny when it is justified only by speculation undermined rather than supported by the record evidence.

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that all parties to the proceedings in the court of appeals are listed in the caption of the case.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states the following. Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by Time Warner Inc., a publicly traded Delaware corporation. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is held (directly or indirectly) by AT&T Corp., a publicly held company.

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FEDERAL COMMUNICATIONS COMMISSION and
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Time Warner Entertainment Company, L.P., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. This case involves a First Amendment challenge to two provisions of a federal statute, the Cable Television Consumer Protection and Competition Act of 1992. The subscriber-limits provision, 47 U.S.C. § 533(f)(1)(A), directs the Federal Communications Commission ("FCC") to limit the number of subscribers that operators of cable-television systems may serve. The channel-occupancy provision, *id.* § 533(f)(1)(B), directs the FCC to limit the amount of their own speech that cable operators may provide over their cable systems.

Cable television is a vast electronic medium that is responsible for bringing Americans much of their news, information, and entertainment. The importance of cable television is reflected in the frequency with which this Court has reviewed the

constitutionality of laws regulating speech in the cable medium. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000) (striking down 1996 Telecommunications Act's "signal bleed" provision, which required cable operators either to scramble sexually explicit channels or to limit programming to certain hours); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (holding that provision of 1992 Cable Act permitting operator to prohibit patently offensive or indecent programming on public access channels violated First Amendment; that similar provision on leased access channels did not violate First Amendment; and that "segregate and block" provision with respect to leased access channels violated First Amendment); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") (vacating judgment that had upheld must-carry rules); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (sustaining must-carry rules after remand).

This case is a natural successor in the series of this Court's decisions regarding cable television. It involves related portions of the statute whose constitutionality this Court reviewed in *Turner I* and *Turner II*. But the statutory provisions at issue here, unlike the more subtle ones involved in *Turner I* and *Turner II*, are textbook violations of free speech: the subscriber-limits provision is akin to a flat limit on the number of copies a newspaper may print, and the channel-occupancy provision is exactly analogous to a law limiting the column space that a newspaper may fill with its own editorial content, as opposed to the content of wire services. Congress's undisputed purpose in enacting these provisions, moreover, was to suppress cable operators' speech not for some reason wholly unrelated to what was being communicated but rather to bring about a mix of speech content more in accord with Congress's view about what the public should see and hear.

The court of appeals was able to sustain these remarkable provisions only by fundamentally misinterpreting *Turner I*, *Turner II*, and other First Amendment decisions of this Court.

The patently quantity-suppressing and content-based nature of the challenged provisions, the vital importance of the cable medium, and the court of appeals' misapplication of this Court's precedents, combine to warrant certiorari in this case. *See* Sup. Ct. R. 10(c).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 211 F.3d 1313. The opinion of the district court (Pet. App. 18a-40a) is reported at 835 F. Supp. 1.

JURISDICTION

The court of appeals entered its judgment on May 19, 2000. The court of appeals denied a timely petition for panel rehearing and rehearing en banc on July 21, 2000. Pet. App. 41a-42a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 533(f), 536, are set forth at Pet. App. 43a-45a.

STATEMENT

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("the 1992 Cable Act" or "the Act"). The Act subjected cable operators to wide-ranging regulation. Among other things, the Act imposed "must carry" obligations (requiring cable operators to retransmit the signals of local broadcast stations), *see* 47 U.S.C. §§ 534, 535, regulated cable rates, *see id.* § 543, and contained various provisions

purportedly designed to promote competition, *see*, *e.g.*, *id.* §§ 536, 548.

This case centers on two provisions of the Act limiting the amount of their own speech that cable operators may communicate to their audiences. Each of these provisions was enacted over the opposition and ultimate veto of the Bush Administration, which found the provisions objectionable on First Amendment grounds. *See* 136 Cong. Rec. S14,182, S14,185 (daily ed. Sept. 28, 1990) (Statement of Administration Policy) ("The Administration opposes [this provision], which limits the number of channels on which a cable operator can carry its own programs. This provision raises most serious constitutional questions. [It] would also require limits on the number of subscribers a cable operator may serve nationwide. This provision is objectionable because current antitrust laws are adequate.").

The subscriber-limits provision, 47 U.S.C. § 533(f)(1)(A), directs the Federal Communications Commission ("FCC") to limit the number of subscribers that a cable operator may reach. The channel-occupancy provision, *id.* § 533(f)(1)(B), directs the FCC to limit the number of channels on a cable system that a cable operator may fill with its own cable-programming services—thereby limiting the amount of their own speech cable operators may provide over their cable systems.[1]

The purpose of these two provisions is set forth in the Senate Report that accompanied the bill that was eventually enacted

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[1] Pursuant to the challenged provisions, the FCC established a subscriber limit of 30 percent of the Nation's subscribers and a channel-occupancy limit of 40 percent of each cable system's channels. *See* 47 C.F.R. §§ 76.503, 76.504; *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8565 (1993); *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098 (1999). Petitions for review of the FCC rules are now under consideration in the D.C. Circuit.

into law. The Senate Report states that "there are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." S. Rep. No. 92, 102d Cong., 1st Sess. 32 (1991) ("S. Rep."). Put differently, Congress was concerned that large cable operators would exert too much influence in public discourse. As a remedy, Congress suppressed the speech of large cable operators in favor of speakers likely to engage in unorthodox or unpopular expression.

In a different provision of the 1992 Cable Act (not challenged here), Congress specifically prohibited cable operators from discriminating against unaffiliated cable-programming services. *See* 47 U.S.C. § 536(a)(3). Discrimination based solely on ownership status could also raise antitrust issues under the Sherman Act. *See* 15 U.S.C. §§ 1 *et seq*. Congress nonetheless enacted the subscriber-limits and channel-occupancy provisions, which purport to provide prophylactic guards against such discrimination.

2. Time Warner challenged the constitutionality of the subscriber-limits and channel-occupancy provisions by filing suit in district court, predicating jurisdiction on 28 U.S.C. § 1331. Relying on numerous uncontradicted affidavits, Time Warner moved for summary judgment on the constitutionality of the provisions in question. Pet. App. 2a, 19a. Time Warner argued that each of the challenged provisions was content-based and therefore subject to strict First Amendment scrutiny, which the Government conceded neither provision could survive. Time Warner further argued that, even if only intermediate First Amendment scrutiny applied, the provisions were still invalid because the Government had failed to demonstrate that either provision constituted a narrowly tailored response to a real, non-

conjectural problem. The Government adduced no affidavit or other evidence in response.

The district court granted Time Warner declaratory and injunctive relief with respect to its claim that the subscriber-limits provision violates the First Amendment, *see id.* at 34a, 40a, and denied Time Warner such relief with respect to its claim that the channel-occupancy provision violates the First Amendment, *see id.* at 28a n.11, 40a. With respect to the subscriber-limits provision, the district court held that, even if, as the Government contended, the provision were subject to no more than intermediate scrutiny, the provision violated the First Amendment:

> Even content-neutral regulations may not burden substantially more speech than necessary, and must leave open ample alternative means of reaching an audience. *See Ward [v. Rock Against Racism]*, 491 U.S. [781,] 802-03 [(1989)]. Any governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience. The First Amendment protects the right of every citizen to reach the minds of any willing listeners and, thus, the speaker's opportunity to win their attention. *Heffron [v. International Soc'y for Krishna Consciousness, Inc.]*, 452 U.S. [640,] 655 [(1981)] (citations omitted).

Id. at 35a. But the district court granted the Government's motion for summary judgment with respect to the channel-occupancy provision. *See id.* at 28a n.11. According to the court, "the channel occupancy limits appear unrelated to content." *Id.*

3. The court of appeals affirmed in part and reversed in part, upholding both challenged provisions. *See id.* at 17a. In the court of appeals' view, both provisions were content-neutral and therefore did not trigger strict scrutiny. *See id.* at 3a-8a, 12a-

15a. Applying intermediate scrutiny, the court of appeals held that both provisions withstood First Amendment review.

a. The court of appeals recognized that the measures were direct limits on the quantity of cable operator speech—limits on "the number of subscribers a cable operator may reach" and on "the number of channels on a cable system that may be devoted to video programming in which the operator has a financial interest." *Id.* at 1a-2a. The court also acknowledged that, in enacting the provisions, Congress deliberately suppressed large cable operators' speech out of a concern "that cable operators would impose their own biases upon the information they disseminate," *id.* at 9a, and that Congress thus acted in an effort to "increase the diversity of voices available to the public via cable," *id.* at 15a. But that purpose did not render the provisions content-based, in the court of appeals' view, because "the Supreme Court made quite clear in *Turner I*" that "making way for some speakers, in the cable context where that necessarily means limiting the speech of others, is not inherently content-based." *Id.* at 6a.

The court of appeals acknowledged that the *Turner I* Court's "acceptance of the must-carry obligation as content-neutral rested in large part upon the Court's understanding that the purpose of the statute was to maintain the availability of broadcast television for those without cable." *Id.* But, the court of appeals said, "[t]he Court also identified the 'bottleneck monopoly power' of the cable operator, arising out of the operator's 'control over most (if not all) of the television programming that is channeled into the subscriber's home,' as the threat to broadcast television." *Id.* at 6a-7a (quoting *Turner I*, 512 U.S. at 656-57, 661).

From this Court's mention of cable's "bottleneck" power, the court of appeals deduced that, in the special context of the cable medium, Congress may suppress speakers in the name of overall speech diversity without triggering strict scrutiny—at least so long as it does not express a preference for or a bias against

the specific content of either the promoted or the suppressed speech or speaker. *See id.* at 7a, 13a-14a. Thus, the court of appeals opined that strict scrutiny did not apply because Congress's "concern was not with what a cable operator might say, but that it might not let others say anything at all in the principal medium for reaching much of the public." *Id.* at 7a. And, according to the court of appeals, a desire to increase speech diversity alone does not necessarily amount to a content preference. "By placing a value upon diversity," the court said, "Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." *Id.*; *see id.* at 14a.

b. Having thus decided that only intermediate First Amendment scrutiny applied, the court of appeals held that both provisions passed muster. According to the court of appeals, self-interested testimony by independent programmers before Congress to the effect that large cable operators "'have the market power to determine what programming services can "make it" on cable'" constituted "substantial evidence" that the subscriber-limits provision addressed a non-conjectural threat of harm. *Id.* at 10a-11a (quoting S. Rep. at 33). In effect, the court of appeals determined that substantial evidence was not necessary at all: it found that the challenged provisions rested simply on "economic common sense." *Id.* at 17a.

Nor was the court of appeals troubled by the fact that Congress had attacked the harm feared with no fewer than four layers of increasingly drastic measures: generally applicable antitrust laws, the anti-discrimination provision, the channel-occupancy provision, and the subscriber-limits provision. Said the court of appeals: "In the subscriber limits provision the Congress took a structural approach to the regulation of cable operators, whereas the antidiscrimination provision of the 1992 Cable Act and the antitrust laws are behavioral prohibitions. As a structural limitation, the subscriber limits provision adds a prophylaxis to the law and avoids the burden of individual

proceedings to remedy particular instances of anticompetitive behavior." *Id.* at 12a. The court of appeals upheld the channel-occupancy provision as "a prophylactic, structural limitation" as well. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

This case presents two fundamental First Amendment questions:

(a) whether strict scrutiny is triggered when Congress imposes direct limits on the quantity of a cable operator's expression in an attempt to enhance the overall diversity of speech content within the cable medium; and

(b) whether a law restricting speech as a "structural" "prophylaxis" is invalid under intermediate scrutiny when it is justified only by speculation undermined rather than supported by the record evidence.

The court of appeals misapplied *Turner I*, as well as other governing precedents of this Court, in addressing those questions. First, the court of appeals misinterpreted *Turner I* as holding that the subscriber-limits and channel-occupancy provisions are subject to no more than intermediate First Amendment scrutiny. These provisions are *direct* limits on the quantity of speech qua speech, while *Turner I* involved merely an access rule *indirectly* displacing speech premised on a rationale that this Court determined was not related in any way to speech. In addition, the court of appeals held that, under *Turner I*, the subscriber-limits and channel-occupancy provisions could be deemed content-neutral, despite Congress's explicit acknowledgment that the purpose of those provisions was to promote "unorthodox" and "unpopular" speech and to stop cable operators supposedly from "slant[ing] information according to their own biases." S. Rep. at 32.

This Court should grant review to establish that, in the cable medium no less than in other media, (a) direct limits on the

quantity of speech automatically trigger strict scrutiny, even if they are content-neutral, and (b) speech suppression in the name of content diversity is unavoidably content-based and therefore again triggers strict scrutiny. This Court should establish that cable television cuts no special hole in the fabric of the First Amendment.

Moreover, the court of appeals interpreted *Turner I* and *Turner II* as holding that intermediate scrutiny can be satisfied by speculation masquerading as "common sense" (Pet. App. 17a) rather than by record evidence, and that a law serving as a "structural" "prophylaxis" is permissible under intermediate scrutiny—even when the Government's objective can be addressed, and indeed has been addressed, by more narrowly tailored remedies that do not interfere with speech.

This Court should grant certiorari to address the court of appeals' misinterpretation of *Turner I* and *Turner II* and to resolve fundamental First Amendment questions in an electronic medium of vital significance in today's society.

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT, IN CABLE AS WELL AS IN OTHER MEDIA, DIRECT LIMITS ON THE QUANTITY OF SPEECH AIMED AT ENHANCING THE DIVERSITY OF CONTENT TRIGGER STRICT SCRUTINY.

A. Direct Limits on Speech Quantity Trigger Strict Scrutiny Even if They Are Content-Neutral.

The subscriber-limits and channel-occupancy provisions are direct limits on the quantity of speech that cable operators may communicate to their audiences. They are analogous to rules limiting the number of copies a newspaper may print and limiting the column space that a newspaper may fill with its own editorial content. Relying on *Turner I*, the court of appeals applied intermediate First Amendment scrutiny. Yet laws directly

targeting speech and capping its quantity are properly subject to strict First Amendment scrutiny, *whether or not they are deemed to be content-based. See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in the judgment) (cataloguing cases involving content-neutral laws in which the Court has applied strict scrutiny).

In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), for example, this Court invalidated a sales tax imposed on newspapers with a circulation of more than 20,000 per week—a financial penalty on subscribership that was less severe than the strict limits imposed here by the subscriber-limits and channel-occupancy provisions. *Grosjean* held that the tax's unmistakable tendency "to limit the circulation of information to which the public is entitled" rendered it wholly inconsistent with the First Amendment. *Id.* at 250. Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), this Court applied "exacting scrutiny" to expenditure limitations that were "direct and substantial restraints on the quantity" of speech itself, *id.* at 39, 44-45, even though they were "neutral as to the ideas expressed," *id.* at 39. In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court employed "exacting scrutiny" to strike down a ban on the use of paid petition circulators, which "impose[d] a direct restriction which 'necessarily reduces the quantity of expression.'" *Id.* at 419, 420 (citing *Buckley*). *Meyer* held that the law could not stand because it "limit[ed] the number of voices who will convey appellees' message and the hours they can speak and, therefore, limit[ed] the size of the audience they can reach." *Id.* at 422-23; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 55 & n.13 (1994) (laws banning entire category of speech may be subject to strict scrutiny even if not deemed content-based); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (applying strict scrutiny to content-neutral law that prohibited grand jury witness from publicly disclosing his own testimony after grand jury's term ended).

This Court has never suggested that a direct limit on the quantity of speech as such may be subject to anything less than strict scrutiny. Instead, this Court has held that intermediate First Amendment scrutiny is reserved for certain special categories of laws, for which the subscriber-limits and channel-occupancy provisions cannot qualify. For example, this Court has applied intermediate scrutiny to restrictions on "conduct" having merely an "incidental" effect on speech when applied to a particular example of that conduct that happens to be expressive. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 570 (1991) (plurality opinion); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 298 (1984); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The *O'Brien* test is triggered only when "'speech' and 'nonspeech' elements are combined in the same course of conduct," 391 U.S. at 376—that is, where a law applies to "speech-plus" or to conduct "intertwined" or "intermingled" with speech.[2] Where (as here) a ban falls on speech, and speech alone, intermediate scrutiny is wholly inapplicable. *See Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech,' . . . not upon any separately identifiable conduct . . . . Cf. *United States v. O'Brien.*").

Similarly, this Court has applied intermediate scrutiny to time, place, or manner rules restricting the noncommunicative aspects of a speaker's activity, such as its decibel level, in order to limit its nuisance impact on others. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989). It has long been axiomatic that, in order to qualify for less than strict scrutiny, such rules must not interfere with a speaker's ability to communicate

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[2] *See American Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 231 (1974); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

his or her chosen content to *all* members of the desired audience.[3]

The subscriber-limits and channel-occupancy provisions, which directly cap the quantity of speech a cable operator may communicate to its audience, plainly cannot qualify for the more relaxed scrutiny accorded to such mere time, place, or manner rules. Accordingly, the provisions are properly subject to strict First Amendment scrutiny, which the Government conceded below they could not survive.

B. Speech Suppression in the Name of Content Diversity Triggers Strict Scrutiny.

In adopting the subscriber-limits and channel-occupancy provisions, Congress stated that its purpose was to address the "concern" that cable operators "will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." S. Rep. at 32. The court of appeals acknowledged that, in enacting the challenged provisions, Congress deliberately suppressed large cable operators' speech specifically out of a concern "that cable operators would impose their own biases upon the information they disseminate," Pet. App. 9a, and that Congress thus acted in an effort to "increase the diversity of voices available to the public via cable," *id.* at 15a, by limiting the reach of the set of voices Congress wanted to stifle—those of cable operators. Despite these remarkable concessions, the

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[3] *See, e.g., Ward*, 491 U.S. at 802; *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-09 (1984) (under *Schneider v. New Jersey*, 308 U.S. 147 (1939), ban on leafleting in public streets cannot be considered time, place, or manner rule); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (ban on handbilling in public areas could not be considered a "time, place, or manner" rule because "[t]here is . . . no restriction in [the] application [of the ban on circulars] with respect to time or place," in that "[i]t is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets").

court of appeals held that, based "upon examination of the statute, the Senate Report that accompanied it, and the Supreme Court's analysis of the must-carry provision at issue in *Turner I*," the statutory provisions at issue were "not content-based." *Id.* at 8a; *see id.* at 15a.

Suppressing the expression of certain speakers in order to promote "diversity" inherently entails a content-based purpose. Under the court of appeals' holding, government may escape strict scrutiny whenever it silences especially popular, powerful, or persuasive speakers—or, indeed, *any* category of speakers—under the seductive banner of "diversity." Yet such efforts would be in flat violation of the fundamental principle "[a]t the heart of the First Amendment . . . that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641.

In this case, the court of appeals held that, "[b]y placing a value upon diversity and competition in cable programming the Congress did not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers." Pet. App. 7a. That reasoning was plainly suspect, however, for the Committee Report accompanying the statutory provisions in this case confirmed that Congress indeed valued what it viewed as "unorthodox or unpopular speech" over the speech of large cable operators. S. Rep. at 32.

More fundamentally, *any* suppression of speech in the name of "diversity" has an inevitably content-based character. A restriction deliberately changing the mix of speakers in the name of "diversity," "balance," or any similarly evaluative characterization is inherently content-based. Among other things, it necessarily rests on an assumption that the speakers the restriction is designed to include will utter speech with a content distinct from that which would have been expressed by the speakers the law is designed to displace. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), for example, this Court struck

down a measure that prohibited various categories of corporations from expending funds in connection with ballot initiatives. In response to the State's defense that "corporations are wealthy and powerful and their views may drown out other points of view," *id.* at 789, the Court stated (in words that appear particularly apt here) "one might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members." *Id.* at 791 n.30. As this Court tersely concluded, "this concept contradicts basic tenets of First Amendment jurisprudence." *Id.*; *see Buckley*, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *see also id.* at 17.[4]

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[4] *See also Turner I*, 512 U.S. at 677-78 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part) (preference for diversity is content-based); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 616-17 (1990) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) ("The FCC's extension of the asserted interest in diversity of views in these cases presents, at the very least, an unsettled First Amendment issue. The FCC has concluded that the American broadcasting public receives the incorrect mix of ideas and claims to have adopted the challenged policies to supplement programming content with a particular set of views. Although we have approved limited measures designed to increase information and views generally, the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers. Indeed, the Court has suggested that the First Amendment prohibits allocating licenses to further such ends."); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 14, 20 (1986) (plurality opinion) ("the State's asserted interest in exposing appellant's customers to a variety of viewpoints is not—and does not purport to be—content neutral"); *id.* at 24-25 (Marshall, J., concurring in the judgment) (same); *Time Warner Cable v. City of New York*, 943 F. Supp. 1357, 1397 (S.D.N.Y. 1996) (opining that diversity of programming is not necessarily "a constitutionally permissible purpose when the City has favored specific speakers in pursuit of this goal" and that "the City's intonation of the rubric

C. This Court Should Grant Review To Hold That There Is No "Cable Exception" to the First Amendment.

The D.C. Circuit interpreted *Turner I* as rendering inapplicable the imposing and venerable body of First Amendment jurisprudence according strict scrutiny to direct, content-based limits on speech. The court of appeals held that the subscriber-limits and channel-occupancy provisions could be subject to intermediate scrutiny even though (a) they directly limit the quantity of cable operator speech and cannot qualify as "conduct" restrictions or as time, place, or manner rules, and (b) they suppress speech in the name of diversity and thus are content-based. But *Turner I* does not support—to the contrary, it contradicts—any notion that there are special, cable-specific First Amendment rules. This Court should grant review to establish that First Amendment principles apply with no less force in the cable medium.

1. This Court should make clear that direct limits on the *quantity* of cable speech, like the subscriber-limits and channel-occupancy provisions, trigger strict scrutiny even if they are deemed to be content-neutral. The D.C. Circuit erred in interpreting *Turner I* as holding otherwise, for *Turner I* did not even *involve* a law that directly limited the quantity of any speaker's expression. Although the must-carry provisions by definition had an indirect effect on speech by "coincidentally inhibit[ing] some freedom of choice of the cable operators as to whose signals are to be carried," *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 45 (D.D.C. 1993) (three-judge court), "any burden imposed by the [must-carry rules] on speech" was "remote and incidental," *id.* at 51 (Sporkin, J., concurring). This Court emphasized that the must-carry rules "do not

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'diversity' is a thinly disguised reference to its preference for the editorial content of Fox News"), *aff'd on other grounds*, 118 F.3d 917 (2d Cir. 1997).

produce any net decrease in the amount of available speech," "leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements," and do not "diminish the free flow of information and ideas." *Turner I*, 512 U.S. at 647, 656. The three-judge district court had observed that "the burdensomeness of the must-carry provisions is illusory in the potentially significant number of cases in which a cable operator receives a carriage request from an operator it would have carried even in the absence of the request." 819 F. Supp. at 47 n.29. This Court found that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry." *Turner II*, 520 U.S. at 214.

The subscriber-limits and channel-occupancy provisions are the *very opposite* of the must-carry rules upheld in *Turner II*. Rather than being access requirements, they are prohibitory, must-*not* carry rules that direct the FCC to set rigid limits on how much speakers in this vital medium may say—to how many subscribers they may transmit their mix of channels and programs, *and* over how many channels they may transmit their own or any affiliated entity's programming as opposed to the programming of others. This Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995), compared a cable operator's speech with that of a parade organizer in arranging a parade composed of a number of distinct floats, marching bands, and contingents of various kinds. Stripped to its essence, the subscriber-limits provision of Section 533(f)(1)(A) sets a ceiling on the number of people a parade may invite as viewers, and the channel-occupancy provision of Section 533(f)(1)(B) sets a cap on the number of floats and marching bands in which the parade organizer has an interest may be included in the procession. The subscriber-limits and channel-occupancy provisions directly cap the quantity of

cable operators' speech and accordingly trigger strict scrutiny under the First Amendment.[5]

2. In addition, this Court should grant review to establish that speech suppression in the name of content diversity triggers strict scrutiny in the cable medium no less than in other media. The court of appeals below maintained that, even if measures suppressing speech in the name of diversity are generally content-related, *Turner I* held this principle inapplicable in the special context of the cable medium. *See* Pet. App. 5a-8a. However, *Turner I* did *not* suggest that Congress was entitled to enhance the "diversity" of the content mix available on cable—because cable was viewed as a supposed bottleneck or because its subscribers suffered from a supposed "deficient" mix of programming—without triggering strict scrutiny. Instead, the Court quite specifically held in *Turner I* that Congress had acted *not* to change the content available on cable but rather to ensure the continued availability of free over-the-air television programming for those who did not subscribe to cable, by safeguarding the economic viability of the over-the-air stations. *See* 512 U.S. at 646; *see also id.* at 649, 652, 658-59; *Turner II*, 520 U.S. at 225-29 (Breyer, J., concurring). This Court noted that the must-carry rules "do not grant access to broadcasters on the ground that the content of broadcast programming will counterbalance the messages of cable operators." *Turner I*, 512 U.S. at

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[5] *United States v. Vopper*, No. 99-1728, and *Bartnicki v. Vopper*, No. 99-1687 (oral argument scheduled for Dec. 5, 2000), also raise the questions of the circumstances under which laws directly targeting expression trigger strict scrutiny and the quantum of record evidence required to sustain such a restriction on speech. Similarly, *FEC v. Colorado Republican Federal Campaign Committee*, No. 00-191 (cert. granted, Oct. 10, 2000), presents the question whether direct federal limits on the amount of campaign expenditures a political party may make in coordination with the party's congressional candidates violate the First Amendment. At a minimum, the instant petition for a writ of certiorari should be held in abeyance pending the Court's decisions in *Vopper* and *Colorado Republican Federal Campaign Committee*.

655. As this Court later summarized it, "[t]he Government's interest in *Turner Broadcasting* was not the alteration of speech." *Hurley*, 515 U.S. at 577. Indeed, the Court warned that the must-carry rules *would* have triggered strict scrutiny if Congress's purpose in enacting them *had* been "to exercise content control over what subscribers view on cable television." *Turner I*, 512 U.S. at 652. And this Court expressly acknowledged that a measure suppressing speech in an effort to promote content diversity within the cable medium plainly *would* have constituted such a content-based law: the Court explained that any measure "designed to ensure that the . . . speech of [some] not drown out the speech of others" would necessarily be "concerned with the communicative impact of the regulated speech" and would thereby trigger strict scrutiny. *Id.* at 658. The D.C. Circuit incorrectly read *Turner I* to stand for the proposition that, because of the unique attributes of cable, congressional efforts to increase the diversity of programming available to cable subscribers justified the application of merely intermediate scrutiny. That, however, is not what this Court held in *Turner I*.

Accordingly, this Court should grant review to vindicate the fundamental principle that a governmental purpose to increase diversity by suppressing speech is content-based—whether inside or outside the cable medium.

3. Given the dynamic nature of the various electronic media and the fluidity of boundaries between them, courts should be hesitant to frame medium-specific First Amendment rules—especially if those rules are tied to the particular characteristics of a specific medium at a certain moment in time. The First Amendment, and the Constitution of which it is part, is a framework for all seasons, one whose principles are suitable for all times and all technological landscapes. The axiom that government may not control information content is a basic rule that extends to all media; it does not vary with accidents of technology. Judgments about the value of information and ideas "are for the individual to make, not for the Government to

decree, even with the mandate or approval of a majority. *Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.*" *Playboy Entertainment*, 120 S. Ct. at 1889 (emphasis added). Thus, in *Denver Area*, a plurality warned that, "aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now." 518 U.S. at 742 (citations omitted).[6]

The court of appeals in this case held that strict scrutiny was inapplicable because of the "cable operator's bottleneck monopoly," which the court described as a "physical and economic barrier to . . . intra-medium competition." Pet. App. 13a-14a. The court of appeals reached its decision based on the legislative history of the 1992 Cable Act and the 1994 decision by this Court in *Turner I* relying on the 1992 Cable Act and its history. The court of appeals ignored altogether such developments as the emergence of the Internet and the contemporary ability of broadcast television, broadband telephone networks, and direct broadcast satellites to deliver video programming to the public.

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[6] *See also* 518 U.S. at 768 (Stevens, J., concurring) ("it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this"); *id.* at 776 (Souter, J., concurring) ("All of the relevant characteristics of cable are presently in a state of technological and regulatory flux. . . . [W]e can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny."). Even those Justices who took a different tack in the *Denver Area* case stressed that First Amendment principles should not be watered down in the cable context. *See, e.g.*, *id.* at 781 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.").

In *Turner I*, this Court most assuredly did not hold that any special physical or economic characteristics inherent in the cable medium automatically and for all time ruled out strict scrutiny for restrictions on cable speech. To the contrary, this Court *rejected*, at 512 U.S. at 637-40, the Government's argument that cable was entitled to no more than the level of First Amendment protection applicable to the broadcasting medium under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). *Turner I* has been described as holding "that cable operators are generally entitled to much the same First Amendment protection as the print media." *Denver Area*, 518 U.S. at 815 (Thomas, J., concurring in the judgment in part and dissenting in part). *Turner I* stressed that, "whatever relevance [the unique physical characteristics of cable transmission] may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence." 512 U.S. at 639; *see also Denver Area*, 518 U.S. at 748 (plurality opinion); *Turner I*, 512 U.S. at 675-76 (O'Connor, J., concurring in part and dissenting in part).

The court of appeals radically misapplied *Turner I* by deciding that cable operators and their would-be audiences, now and seemingly forever, are not entitled to the same constitutional protection as are members of the print media and their readers. Although the supposed existence of a cable "bottleneck" may be relevant to a governmental interest, it puts the cart before the horse (and fossilizes the horse) to treat the asserted physical or economic characteristics of the medium at issue as of some point in the past (Pet. App. 6a-7a) as lowering the otherwise applicable standard of review at the *outset* of the constitutional analysis. *See, e.g., Turner I*, 512 U.S. at 640 ("the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 249 & n.13, 251, 256, 258 (1974) (no diminished constitutional protection despite monopolies in newspaper markets).

Under the court of appeals' approach, the First Amendment law of cable television will evidently be frozen as the medium arguably existed circa 1992 or 1994—without any inquiry into ever-changing technological realities such as the development of the Internet, which this Court has already recognized as "a unique and wholly new medium of worldwide human communication." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997) (citation omitted). The court of appeals' holding thus flies in the face of the fundamental principle that a statute's constitutionality must be re-assessed in light of changed circumstances, for "[a] statute [constitutionally] valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935); *see also Baker v. Carr*, 369 U.S. 186, 254 n.6 (1962) (Clark, J., concurring) (same); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (Holmes, J.) ("A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.").

II. THIS COURT SHOULD GRANT REVIEW TO REAFFIRM THAT AVOWEDLY PROPHYLACTIC SPEECH-RESTRICTING PROVISIONS CANNOT SATISFY INTERMEDIATE SCRUTINY BASED ON MERE SPECULATION.

The court of appeals' judgment merits review for the additional reason that it conflicts with decisions of this Court formulating and applying intermediate First Amendment scrutiny.

A. This Court Should Grant Review To Establish That Intermediate Scrutiny Cannot Be Satisfied by Supposed "Common Sense" in the Face of Contrary Record Evidence.

The court of appeals identified as the problem addressed by the challenged measures the risk that large cable operators

might refuse to carry unaffiliated new programming services solely on anticompetitive grounds. *See* Pet. App. 10a-11a. But the only "evidence" to which the court of appeals pointed consisted of self-interested testimony in congressional hearings to the effect that large cable operators "'have the market power to determine what programming services can "make it" on cable.'" *Id.* at 10a (quoting S. Rep. at 33); *see id.* at 16a. The court of appeals pointed to no evidence that this has ever actually happened in the real world—let alone that non-carriage has caused injury so serious as to justify a significant burden on cable operators' speech.

Nor could it have done so. For example, even though the challenged provisions were purportedly intended to promote entry by independent cable-programming services, such entry was rampant even before the provisions took effect. During the period from 1993 to 1999—a period in which the subscriber-limits provision was stayed and not in force—the number of cable-programming services almost tripled, from 106 to 283. *Compare Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report, 9 FCC Rcd 7442, ¶ 161 n.434 (1994) ("*First Competition Report*") *with Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, ¶ 179 (2000). In the same period, the share of integrated services fell from 53 to 37 percent. *Compare First Competition Report* ¶ 161 *with Sixth Competition Report* ¶ 179. Shortly before Congress acted, two government agencies (the FCC and the National Telecommunications and Information Administration) issued reports concluding that no real problem existed that would justify intervention. *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, ¶¶ 76, 91, 127 (1990); NTIA, *Video Program Distribution and Cable Television; Current Policy Issues and Recommendations* 102, 106 (1988). The President, who vetoed the initial version of the 1992 Cable Act, took the position that

the provisions were "objectionable because current antitrust laws are adequate." 136 Cong. Rec. S14,182, S14,185 (daily ed. Sept. 28, 1990) (Statement of Administration Policy).

In the end, the court of appeals simply ignored the record evidence and held that evidentiary support was unnecessary. The court opined that the provisions could be sustained as a matter of "economic common sense." Pet. App. 17a. But the court of appeals pointed to no evidence at all that the incentive to discriminate would be likely to prevail so often over the incentive to provide attractive programming to subscribers as to give rise to a serious problem. Moreover, precisely the same "bit of economic common sense" embraced by the court of appeals was pressed unsuccessfully upon this Court in *Turner I*, where this Court demanded "a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied," 512 U.S. at 667 (plurality opinion), despite numerous factual findings set forth in the text of the 1992 Cable Act itself. During the past five years, the cable industry has become subject to ever-increasing competition from direct broadcast satellites and other sources, so that cable operators' incentive to provide optimal programming has only strengthened. Thus, if "economic common sense" could not obviate an empirical inquiry in *Turner I*, it certainly could not here.

The court of appeals' judgment thus squarely conflicts with *Turner I*, *Turner II*, and the numerous other decisions of this Court holding that, under intermediate scrutiny, restrictions on speech cannot be justified by unadorned speculation—even if labeled "common sense"—in the face of conflicting record evidence. In *Turner I*, a plurality of this Court explained that a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrate[d] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664, 666. In *Turner II*, this Court noted, in addition to the extensive factual findings made by Congress in the

text of the statute itself, "a record of tens of thousands of pages" supporting the rules. 520 U.S. at 187 (internal quotation marks omitted). The Court stressed that there was a "substantial basis to support Congress's conclusion that a real threat justified enactment of the must-carry provisions." *Id.* at 196. And the Court pointed to "specific support" for Congress's conclusion (*id.* at 197): "[s]ubstantial evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 202-03); and "[e]mpirical research in the record before Congress" (*id.* at 208). Nothing remotely comparable—and certainly no contemporary evidence relating to market conditions *today*—exists in this case.

Both this Court and the lower courts have rejected appeals to unsupported "common sense" of the very kind accepted by the court of appeals in this case. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), for example, a plurality of the Court agreed that "common sense" supported the State's argument that a ban on liquor advertising would reduce consumption (*id.* at 505) but nonetheless held that, "[a]lthough the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption." *Id.* at 506 (citation omitted). "[W]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* at 505. Similarly, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court acknowledged that "common sense" supported a ban on disclosing alcohol content on beer labels. *Id.* at 487. But the Court held that "the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars" (*id.* at 489) and that

the Government had submitted only "various tidbits" of "anecdotal evidence and educated guesses" (*id.* at 490).[7]

B. This Court Should Grant Review To Establish That Prophylactic Speech-Restricting Measures Are Invalid Under Intermediate Scrutiny.

The court of appeals gave further grounds for review by upholding the subscriber-limits and channel-occupancy provisions as permissibly "prophylactic," when they are obviously and intolerably overinclusive. Pet. App. 12a, 17a. In addition to the antitrust laws, the 1992 Cable Act's anti-discrimination provision already prohibits cable operators from discriminating against cable-programming services on the basis of affiliation. *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). The channel-occupancy provision then adds a sweeping structural ban: it restricts the speech of cable operators by limiting the number of channels that may be devoted to programming in which they have a financial interest—thereby making impossible not only discrimination based solely on ownership status (already banned elsewhere) but also editorial judgment in favor of superior (if affiliated) programming. *See* 47 U.S.C. § 533(f)(1)(B). Finally, lest any affiliation-based discrimination

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[7] *See also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) ("'Th[e] [Government's] burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'") (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (same); *Ibanez v. Florida Dep't of Business & Prof'l Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech); *Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) (invalidating regulation of chiropractor advertising, which was based on "common sense" and anecdotal evidence); *Harman v. City of New York*, 140 F.3d 111, 122 (2d Cir. 1998) (relying on *Turner I* to conclude that, under intermediate scrutiny, "the government cannot rely on assertions, but must show a basis in fact for its concerns").

somehow escape (a) the antitrust laws, (b) the anti-discrimination provision, *and* (c) the channel-occupancy provision, Congress adopted the subscriber-limits provision to prohibit cable operators from speaking to audiences of more than a certain size. *See id.* § 533(f)(1)(A). The apparent congressional thinking was that, if cable operators grow large enough—even if their growth reflects only the popularity of their speech—they might be able to "preclude new programming services from attaining the critical mass audience necessary to survive." Pet. App. 9a. By any measure, this piling of safeguard upon preventive safeguard is gross overkill.

The court of appeals held that the challenged provisions were nonetheless permissible because they "ad[d] a prophylaxis to the law and avoi[d] the burden of individual proceedings to remedy particular instances of anticompetitive behavior." *Id.* at 12a; *see id.* at 17a. But this Court has held that, under the First Amendment, "prophylaxis" is a ground for suspicion rather than approval. For example, in *Edenfield v. Fane*, 507 U.S. 761 (1993), this Court held that a flat ban on personal solicitations by accountants could not survive intermediate scrutiny as prophylaxis against fraudulent solicitations. Reaffirming the principle that "[b]road prophylactic rules in the area of free expression are suspect," *id.* at 777 (internal quotation marks omitted), this Court required a showing that personal solicitations were so likely to result in fraud that, without a flat ban, a serious risk of harm would remain. *Id.* at 774-77.[8]

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[8] *See also Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 193 (noting "the availability of other regulatory options which could advance the asserted interests 'in a manner less intrusive to . . . First Amendment rights'"); *Coors Brewing*, 514 U.S. at 491 (citing "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech).

Moreover, this Court has specifically instructed that government cannot ban speech "prophylactically" in order to avoid the administrative burden of individual proceedings. It is *always* simpler to ban speech rather than to proceed on a case-by-case basis—easier to outlaw leafletting, for example, than to enforce a law against littering, and more efficient to bar all household soliciting than to enforce a law prohibiting soliciting at households that have posted "No Soliciting" signs. But this Court repeatedly has ruled "emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (citing *Schneider v. New Jersey*, 308 U.S. 147 (1939), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985).

Lower courts have similarly rejected "prophylactic" provisions under intermediate scrutiny. For example, lower courts have struck down municipal exclusivity rules permitting only a single cable operator in a given city—akin to subscriber limits of zero for newly entering cable operators—on the ground that municipal governments must address directly the potential problem of disrupting traffic on city streets, rather than enacting prophylactic measures that deny access altogether to competing cable providers.[9] Lower courts have also invalidated a prophylactic ban on telephone company provision of video

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[9] *See Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir.), *cert. denied*, 512 U.S. 1235 (1994); *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633, 636-37 (M.D. Ga. 1991), *remanded*, 992 F.2d 1178 (11th Cir. 1993); *Jones Intercable of San Diego, Inc. v. City of Lake Elsinore*, No. SACV 90-636-GLT (C.D. Cal. Apr. 4, 1991); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 965-66 (N.D. Cal. 1987); *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1475-78 (N.D. Cal. 1986); *cf. Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484, 1502-04 (N.D. Ala. 1991) (invalidating under *O'Brien* municipal restriction on transfer of franchise).

programming[10] and a prophylactic opt-in rule to protect the privacy of subscriber information held by telecommunications carriers.[11]

Lest prophylaxis become an easy excuse for suppression of speech, and technological shibboleths an easy substitute for precise analysis and serious attention to empirical evidence, this Court should review the judgment below.

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[10] *See Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996); *U S WEST, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *vacated on other grounds*, 516 U.S. 1155 (1996); *Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), *vacated on other grounds sub nom. United States v. U S WEST, Inc.*, 516 U.S. 1155 (1996), *on remand*, 84 F.3d 1153 (9th Cir. 1996); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, Civ. No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994); *GTE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. Jan. 13, 1995), *remanded as moot*, No. 95-1738 (4th Cir. May 15, 1996); *United States Tel. Ass'n v. United States*, No. 1:94cv1961 (D.D.C. Feb. 14, 1995), *vacated and remanded as moot*, No. 95-5117, 1996 WL 587633 (D.C. Cir. Sept. 16, 1996); *Southwestern Bell Corp. v. United States*, Civ. A. No. 3:94-CV-193-D, 1995 WL 444414 (N.D. Tex. Mar. 27, 1995), *remanded as moot*, No. 95-10478 (5th Cir. Apr. 30, 1996); *Southern New England Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *see also GTE California, Inc. v. FCC*, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) (concluding, where majority did not reach merits, that 47 U.S.C. § 533(b) was "counterproductive" and "does not even survive rationality review"). Ultimately, the litigation surrounding Section 533(b) became moot when Congress repealed the provision as part of the Telecommunications Act of 1996. *See United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415, 416 (1996) (*per curiam*).

[11] *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1237-39 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7945

ROBERT D. JOFFE
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

October 19, 2000